IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5631 OF 1995

M/s. Bajaj Auto Limited
Akurdi, Pune - 35. .. Petitioner

Vs.

1. Shri Ashok Dnyanoba Dhumal
At - Pimple Gurav, Anand Nagar,
Post : Aundht-Camp, Pune - 27.
2. Shri B.M. Khodade
Presiding Officer
First Labour Court, Pune. .. Respondents

Mr. J.P. Cama with Ms.Swati V. Deshpande i/by M/s. Bodhanwala & Co. for Petitioner.
Ms. Seema Sarnaik for Respondent No.1.

CORAM: B.H. MARLAPALLE, J.

Date : October 07, 2005.

ORAL JUDGMENT:

1. This petition filed by the employer-company takes exception to the award passed by the First Labour Court at Pune in Reference (IDA) No.36 of 1990 directing to reinstate the respondent-workman on his original post with continuity of service and full backwages for the intervening period. The undisputed factual matrix relevant for deciding the petition could be described as under.

1A. The respondent-workman came to be employed as

a helper on temporary basis as a daily rated unskilled

workman during the following periods:-

Sr.No.	Date of Employment	Date of Termination	No. of days worked
1.	23-07-1984	31-12-1984	132
2.	10-02-1985	18-03-1985	31
3.	20-12-1985	19-02-1986	32
4.	28-02-1986	07-07-1986	107
5.	09-07-1986	31-08-1986	43
6.	16-03-1987	15-11-1987	119

. After 15-11-1987 the respondent-workman was not employed by the petitioner and no dispute was raised on this count. By an order dated 28-03-1988 he came to be employed as Helper-1 from 26-03-1988 for a maximum period of about one month and the appointment was on account of exigencies of work and was likely to be terminated at any time during the period of 30 days without notice or salary/wages in lieu of notice. The daily rate of wages was fixed at Rs.6.80 in the grade of Rs.6.80-12.30. On 25-04-1988 he was issued a letter of extension since the job for which he was

temporarily employed had not been completed. This extension of one month was upto 25/5/1988. Similarly another extension letter was issued on 25/5/1988 for extending the temporary tenure upto 30-09-1988. Finally, by the last communication dated 30-09-2988 his tenure was extended upto 30-11-1988 on the same terms and conditions. After 30-11-1988 there was neither any extension nor any fresh appointment order was issued in favour of the respondent-workman. He raised a demand for reinstatement sometimes in the year 1989 and the said demand came to be referred for adjudication to the Labour Court in Reference (IDA) No.36 of 1990.

2. In the statement of claim filed before the Labour Court on or about 29-06-1990, the workman stated that he was in the employment since 29-07-1984 as a helper in the paint shop and claimed that as he insisted/requested for all benefits of permanency, the employer terminated the service from 1/12/1988 or the employer did not give any fresh appointment. He also claimed that the juniors and fresh employees were retained but he was not continued. Para 4 of the statement of claim reads thus and the reinstatement

demand as made was based on the averments therein:-

> "4. In fact, while giving artificial breaks to the Second Party workman, the First Party Management never followed the procedure laid down under the Industrial Disputes Act so also the provisions of Standing Orders applicable to them. The First Party Management had never displayed seniority list on the Notice Board before terminating the services of the Second Party workman. Similarly, no permission was obtained from the appropriate Government before taking the action of termination of the Second Party."

3. The Management filed its Written Statement and admitted that the respondent-workman was employed as a helper on temporary basis with daily rated wages. In support of the petitioner's contention that the demand for reinstatement or the allegation of illegal termination from service could not be entertained as the respondent had not attained the status of permanency either under the Standing Orders or on account of completing 240 days of service in the last spell of his appointment i.e. from 26-03-1988 to 30-11-1988, it was pointed out that during this period he had worked for 207 days and he was paid for 207 days because he was a daily rated helper. It was further submitted by the Management that the demand

for the different models of two wheelers (Scooters) and three wheelers (auto-rickshaw) had considerably dropped in the domestic market thereby reducing the requirement of temporary helpers to be engaged in different production shops, as a result of which the number of temporary helpers employed in the factory had also reduced. It also submitted that by any stretch of imagination the non engagement or non-renewal of temporary tenure did not amount to an act of retrenchment, leave alone illegal retrenchment.

4. The workman himself stepped in the witness box to support his claim and the Management examined Mr. Suresh Purushottam Dani who was at the relevant time working as Senior Manager (Personnel) with the Company. He was responsible for recruitments, industrial relations, welfare activities, appointments and terminations etc. of the workman required in the different shops. He was also notified as a Manager under the Model Standing Orders.

. On appreciation of the evidence and by taking into consideration the rival submissions advanced by both the parties, the learned Judge of the Labour

Court held that the respondent-workman was illegally terminated and the said termination amounted to retrenchment without complying with the mandatory requirements of Section 25F of the Industrial Disputes Act, 1947 (the I.D. Act for short). The Labour Court also held that the exception carved out in Section 2(oo)(bb) of the I.D. Act was not applicable to the respondent-workman on the ground that there was sufficient work available in the factory at the relevant time and the termination of service on expiry of the tenure fixed in the appointment order was not bona fide because the work for which the workman was employed was still in existence. The Labour Court further held that the action of the employer also suffered from other irregularities like non maintenance of seniority list. Though the Labour Court accepted the contention that from 26/3/1988 to 30/11/1988 the workman had worked for 207 days, it held that the days of weekly off during this period as well as festival holidays were required to be added and if so added the total number of working days were beyond 240 days during that period. On this count it was necessary for the Management to comply with the mandatory requirements of Section 25F of the I.D.

Act, as per the Labour Court.

5. Mr. Cama, the learned Senior Counsel appearing for the petitioner, submitted that the Labour Court fell in manifest errors both on facts as well as in law while passing the impugned award. As per him the workman had never raised the plea of illegal retrenchment either in the statement of claim or while raising the demand for reinstatement and when such a claim was not made, it was not permissible in law for the Labour Court to adjudicate upon the issue of illegal retrenchment. Even otherwise the appointments in the last tenure being for fixed period, they were within the ambit of Section 2(oo)(bb) of the I.D. Act and there was no evidence brought on record that after the workman's appointment was not renewed, some other helpers were recruited in the said shop or in some other department. The appointment being for a fixed tenure, the respondent was put on notice as and when the appointment orders were issued and there was no termination of his service. It was a case of non renewal of contract of employment on expiry of the original tenure of the contract and thus covered by the first part of Section

2(oo)(bb) of the I.D. Act. It was urged by the petitioner that on these grounds the impugned award is required to be quashed and set aside.

. Ms. Sairnaik, the learned counsel for the respondent-workman, on the other hand has supported the impugned award and as per her it does not call for any interference under the supervisory jurisdiction of this court. The view taken by the Labour Court is a possible view on assessment of the oral and documentary evidence and there was sufficient work available under the petitioner's factory at the relevant time. This was not an employment under a project or a scheme nor was he appointed on probation. It was also submitted that the discontinuation of employment was not by way of any term of appointment stipulated in the contract of service or standing orders. She has relied upon the decision in the case of S.M. Nilajkar and Ors. vs. Telecom District Manager, Karnataka reported in **AIR 2003 SC 3553**.

6. It is true that the workman had not raised the plea of illegal retrenchment and all that was stated in the statement of claim before the Labour Court was

two folds, namely, with effect from 1/12/1988 he was not given appointment though the work was available and appointment was denied because he insisted for the benefits of permanency and secondly, as quoted hereinabove, he was given artificial breaks without following the procedure laid down under the I.D. Act as well as the Standing Orders and the Management failed to display seniority list and obtain permission from the appropriate Government before taking action of termination. The learned senior counsel rightly relied upon a three Judge Bench decision in the case of Shankar Chakravarti vs. Britania Biscuit Co. Ltd. and anr. reported in **AIR 1979 SC 1652** in this regard and more particularly the following observations :-

> ".....If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. The rules of fair play demand that where a party seeks

> to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary."

7. As the workman had raised an issue of obtaining Government permission before termination as well as displaying of seniority list, obviously, it was for the Management to state that Section 25N of the I.D. Act was not attracted and consequently it was not required to comply with the mandatory provisions of Section 25F of the said Act. The pleadings of the Management in its Written Statement are required to be read in this context as it has come in the evidence of its witness that the Company at the relevant time was engaging about 8850 employees, including temporary workers and thus Chapter V-B of the I.D. Act was applicable to the petitioner.

8. On the first point of completion of 240 days from 26/3/1988 to 30/11/1988 the findings of the Labour Court that the workman completed more than 240 days of service are unsustainable. The Labour Court sought to add to the actual number of working days the

days of weekly off during that period and as per the Labour Court they came to 35 days and they were required to be added to the days actually worked and so added, the number of days worked exceeded 240 days. The Labour Court referred to the decision of the Supreme Court in the case of Workmen of American Express International Banking Corporation vs. Management of American Express International Banking Corporation reported in **AIR 1986 SC 458**. The said decision was based on the provisions of Sections 16 to 18 of the Delhi Shops and Establishments Act, 1954 which provide for close days, weekly holidays and wages for the holidays. Sections 17 and 18 read thus:-

> "17. Every employee shall be allowed at least twenty four consecutive hours of rest (weekly holiday) in every week, which shall, in the case of shops and commercial establishments required by this Act to observe a close day, be on the close day".
>
> "18. No deduction shall be made from the wages of any employee on account of the close day under section 16 or a holiday granted under section 17 of this Act.
>
> If an employee is employed on a daily wage, he shall none the less be paid his daily wage for the holiday and where an employee is paid on piece rates, he shall receive the average

of the wages received during the week."

. In para 5 of the said decision, their Lordships observed as follows:

> ".....What is continuous service has been defined and explained in S.25-B of the Industrial Disputes Act. In the present case, the provision which is of relevance is Section 25-B (2)(a)(ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if the workman, during a the period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is 'actually worked under the employer'. This expression, according to us, cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc....."
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> (emphasis supplied)

9. The above observations were also referred to in the case of Essen Deinki vs. Rajiv Kumar reported in **(2002) 8 SCC 400** and it has been held, inter alia, that the requirement of the statute of 240 days cannot

be disputed and it is for the employee concerned to prove that he has in fact completed 240 days in the last preceding 12 months' period. The onus of proving the completion of 240 days of work is thus shifted to the workman. In the case of Range Forest Officer vs. S.T. Hadimani reported in **(2002) 3 SCC 25** it has been reiterated that it is for the claimant to lead evidence to show that he had in fact worked upto 240 days in the year preceding his termination.

10. In the case at hand, there is no evidence placed before the Labour Court that respondent-workman was being paid for weekly holidays or that under any statutory requirement he was so required to be paid. It was also not brought on record that similarly placed helpers or any other daily rated employees in the factory were being paid for the weekly rest days. It would be useful to refer to the relevant provisions of the Factories Act, 1948, the Maharashtra Factories Rules 1963 and the Government Resolution issued by the Government of Maharashtra on 22nd July 1998 under Section 5(2) read with Section 3(1) of the Minimum Wages Act, 1948 in respect of the employment in Engineering Industry. There is no dispute that the

petitioner is a factory engaged in the manufacture of 2 and 3 wheel vehicles and, therefore, an Engineering Industry. Sections 51 and 52 of the Factories Act have prescribed weekly hours and weekly holidays. Section 51 states that no adult worker shall be required or allowed to work in a factory for more than 48 hours in any week. Section 52 mandates that there shall be a weekly holiday and the working days of the week shall be as prescribed thereunder. Under Section 54 daily hours have been prescribed. It states that subject to the provisions of Section 51, no adult worker shall be required or allowed to work in a factory for more than 9 hours in any day. As per Section 59 where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect to overtime work, be entitled to wages at the rate of twice his ordinary rate of wages. The scheme of these sections, therefore, shows that in a week the workers in the factory are required to work for six days and the daily hours are normally eight hours so that in a week they work for 48 hours. There is no provision under the Factories Act providing for payment for the weekly holidays as is the case under the Delhi Shops

and Establishments Act and as referred to hereinabove. Sections 79 and 80 provide for annual leave with wages and wages during leave period respectively. Section 79 states that every worker who has worked for a period of 240 days or more in a factory during the calendar year shall be allowed during the subsequent calendar year leave with wages for a number of days calculated at the rate provided thereunder.

. In the G.R. dated 22/7/1998 the minimum rates of wages for the Engineering Industry have been prescribed on per month basis and for appointment on daily wages so as to comply with the requirement of minimum rates prescribed a procedure has been set out in Clause 3 of the said G.R. It reads thus:-

> "The minimum rates payable to any employee employed in any category on daily wages shall be computed by dividing the minimum rate of monthly wages fixed for the class of employees to which he belongs by 26, the quotient being stepped upto nearest paisa."

. If the monthly wage was to be divided by 30 days while fixing the minimum daily wages, it would be presumed that such daily rated employees were entitled

for wages for weekly rest days. The State Legislature thus aware that under the Factories Act there was no mandatory requirement of payment of wages for the weekly rest days and, therefore, while fixing the daily wages, the monthly wages prescribed in the GR are required to be divided by 26 days and not by 30 days.

11. The decision in the case of American Express International Banking Corporation (Supra) has to be read in this context and even in the said decision it is clear that the expression "actually worked under the employer" must necessarily comprehend all those days during which the workman was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute or the standing orders. It has come on record that to the petitioner factory the provisions of Model Standing Orders are applicable and the Model Standing Orders do not prescribe that the workmen working in the factory/establishment are required to be paid for the weekly rest days.

12. The employer has pointed out that during the

period from 26/3/1988 to 30/11/1988 the respondent-workman worked for 207 days. This could not be impeached by any other evidence. The workman on the other hand claimed that he worked for 215 days but for the period from March 1988 to November, 1988. Admittedly, in the month of March, 1988 he reported for duty from 26/3/1988 only and he was not in employment for the earlier period. In these circumstances, the Management reasonably proved that workman had worked for 207 days. The conclusions drawn by the Labour Court that the respondent-workman had worked for 240 days during the period from 26/3/1988 to 30/11/1988 are thus manifestly erroneous and against the well settled legal position.

13. Now coming to the applicability of Section 2(oo)(bb) of the I.D. Act. At the first instance adjudication on this issue would be called for when it was proved that the workman had put in 240 days service or more during the preceding 12 months to the date of termination. This issue has been answered against the workman in the instant case and, therefore, it is not necessary to examine the applicability or otherwise of the said Section. The

workman in his depositions, while in the witness box, admitted that he was working on the conveyer line of paint shop as a helper and when conveyer was in motion the paint shop operator was required to paint certain parts and he was a helper to such a paint shop operator. He also admitted that as per the factual position of the work done by the paint operator, the helpers are provided to help him. He stated that he was not aware as to the exact appointment date of each of the temporary employees. He also admitted that he had no documentary evidence to show that on his termination any fresh employee was engaged nor could he tell any such names. The witness of the Management in detail stated the procedure followed for recruitment of helpers on temporary basis and stated that as and when there was increase of work of permanent nature, appointments of such temporary workers were made on daily wages which was almost equal to the wages paid to the permanent workers. He also stated that the factory maintained the seniority list of the employees and no junior employee to the respondent-workman was continued in the employment. He went on to state that the respondent-workman was not terminated from service and there was no case of

discharge or dismissal and it was a case of non renewal of contract on expiry of the original contract period. He further pointed out that because of the market situation, the requirement of manpower was reduced and on the day he was examined there was no temporary helper employed in the factory. He specifically denied the suggestion that the workman was being paid for weekly off days. The Labour Court found fault with the employer for not maintaining seniority list. The evidence of the Management's witness states otherwise. However, it is now well established that the requirements in Clause (a) and (b) of Section 25F of the I.D. Act are mandatory whereas the requirements under Clause (c) thereunder is only directory and, therefore, failure to maintain a seniority list by itself would not result into the termination order being declared as illegal merely on the ground that seniority list was not maintained. In any case, there was no termination of service in the instant case.

14. It is thus clear that the view taken by the Labour Court is against the well settled legal position by a catena of decisions and, therefore, the

impugned award being contrary to law, it deserves to be quashed and set aside, by exercising powers under Article 227 of the Constitution of India.

15. The petition, therefore, succeeds and the same is hereby allowed. The impugned award is quashed and set aside, Reference (IDA) No.36 of 1990 fails and the same stands dismissed. Rule made absolute accordingly with no order as to costs.

(B.H. Marlapalle,J.)